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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

Request For

FILE: B-198955

DATE: April 13, 1981

MATTER OF: Rear Admiral Harvey E. Lyon - [Waiver of Overpayment of Retired Pay]

DIGEST: Retired naval officer was appointed to civilian position with Energy Research and Development Administration (ERDA), but, due to administrative error, Navy failed to reduce his military retired pay under provisions of Dual Compensation Act, 5 U.S.C. § 5531, et seq. In view of his knowledge of Dual Compensation provisions, his failure to thoroughly question agency officials as to applicability of Dual Compensation Act makes him at least partially at fault in the matter so as to preclude waiver of the erroneous payments of retired pay.

Rear Admiral Harvey E. Lyon, USN, Retired, requests reconsideration of our Claims Division's determination dated April 29, 1980 (Claim No. Z-2816216), denying his request for waiver of erroneous overpayments of retired pay totaling \$54,050.71. For the reasons stated below, we sustain our Claims Division's denial of waiver.

Admiral Lyon retired from the Navy on May 30, 1975, and on June 2, 1975, he was appointed to an Executive Management (Excepted) position with the Energy Research and Development Administration (ERDA), where he was employed until January 13, 1979. During that period his military retired pay was not reduced as it should have been under the provisions of the Dual Compensation Act of 1964, 5 U.S.C. §§ 5531, et seq. As a result Admiral Lyon was overpaid retired pay in the total amount of \$54,050.71.

The report from the Navy states that its administrative error in failing to reduce Admiral Lyon's retired pay was the result of the failure of the Navy to receive the personnel action form (SF-50) from ERDA. However, the Navy admits that it received two statements of employment in June 1976, and March 1978, from Admiral Lyon showing his employment with ERDA. The Navy recommends denial of the request for waiver on the basis that:

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B-198955

- (1) there was no evidence that he was advised the position was exempt from dual compensation,
- (2) if he had asked about dual compensation he would have been correctly advised, and
- (3) dual compensation would have been discussed in Navy briefings for retiring flag officers as well as in retirement booklets provided to all retiring members.

Our Claims Division denied Admiral Lyon's request for waiver on the basis that he was aware of the dual compensation restrictions but failed to act in a reasonable manner to question whether he was exempt from coverage under the statute. In addition, our Claims Division held that Admiral Lyon should have questioned the notation "Not U.S.C. 5532 (d)" appearing on his SF-50 which indicated he was not covered by an exemption from dual compensation. Therefore, our Claims Division held that his failure to pursue these questions placed him at least partially at fault which precludes waiver of his claim.

On appeal Admiral Lyon states that he took full reasonable action to determine his employment status and was justified in believing that his appointment was an exempted one. He states that he asked if the position with ERDA was "exempt" and was advised that it was, but he does not recall if he mentioned "dual compensation" in that context. He also states that he was aware that ERDA had on occasion granted exemptions to certain employees from dual compensation. Admiral Lyon further says that he questioned a representative from the ERDA personnel office whether his position was exempt (yes), whether his military retirement would be affected (no), and whether ERDA would mail a copy of his SF-50 to the Navy (yes). He states that he later checked again to

B-198955

assure himself that ERDA had mailed a copy of his SF-50 to the Navy, and, when ERDA was later absorbed into the Department of Energy, Admiral Lyon states that he again contacted the personnel office to verify that his position remained "exempt". Therefore, he requests that we further review his waiver request for the possibility of favorable action.

With regard to dual compensation, 5 U.S.C. § 5532(b) (1976) provides that a retired regular military officer is entitled to receive the full pay of a civilian office or position but, during such appointment, his military retired pay shall be reduced by the formula set forth in the section. Section 5532(d) (1976) provided that the Civil Service Commission may prescribe regulations permitting exceptions from the reduction in retired pay for special or emergency employment needs. At the time when Admiral Lyon was hired by ERDA, the regulation in effect permitted agencies to request the Civil Service Commission to approve an exception to the restrictions based on employment needs that could not otherwise be readily met. 5 C.F.R. 550.603 (1975). However, a report from the Department of Energy (successor agency to ERDA) indicates that few exemptions were requested and that there is no evidence that ERDA ever requested an exemption for Admiral Lyon. The report further states that Admiral Lyon may have confused his exempt status from agency competitive appointment procedures with exempt status under dual compensation provisions.

Under the provisions of 10 U.S.C. § 2774, the Comptroller General may waive collection of certain debts when collection would be against equity and good conscience and not in the best interest of the United States except where, in the opinion of the Comptroller General:

"* * * there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member * * *."

B-198955

We have interpreted "fault", as used in 10 U.S.C. § 2774, as including something more than a proven overt act or omission by the military member. Thus, we consider fault to exist if in the light of all of the facts it is determined that he should have known that an error existed and taken action to have it corrected. The standard we employ is to determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlement. See Captain Donald Reid, B-197627, June 3, 1980, and Colonel Robert L. Johnston, B-178042, May 19, 1977.

As to whether Admiral Lyon should have known that an error existed, or should have more thoroughly questioned his status under dual compensation, we face a difficult determination. Admiral Lyon states that he was aware of the dual compensation restrictions, but he believed he was exempt from those restrictions due to the nature of his appointment. The report from the Navy states that dual compensation is discussed in Navy briefings for retiring flag officers as well as in retirement booklets provided to all retiring members. The person who interviewed and hired Admiral Lyon for his position at ERDA, Major General Edward B. Giller, USAF (Retired), states that he was more than familiar with the Dual Compensation Act, that he knew how difficult it was to get exemptions from the Act, and that he is quite certain he did not advise Admiral Lyon that Admiral Lyon could expect to be exempt from the Act. However, General Giller states he cannot recall if he discussed the dual compensation question with Admiral Lyon.

Admiral Lyon states that he received assurances from a representative from ERDA Personnel that his military retired pay would not be affected. On its face, the SF-50 Admiral Lyon received did not clearly indicate whether he was covered or exempt from the dual compensation restrictions. Under category 30 "Remarks" there appeared the following line:

B-198955

"RETO/N/05-31-75/447654/0-8/REG/20/
NONCMBT/Not U.S.C. 5532 (d)."

This is the only reference to dual compensation appearing on this form, and Admiral Lyon states that when he reviewed this form with a representative from the ERDA Personnel office he was advised:

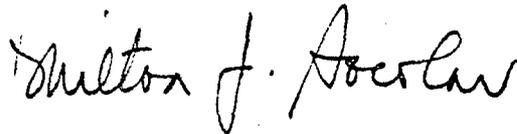
- (1) the position was exempt,
- (2) his military retirement would not be affected, and
- (3) a copy of the form would be sent to the Navy.

While we do not question the veracity of these statements, we believe that, under the circumstances, Admiral Lyon should have verified this information with higher officials in ERDA or with Navy officials who were handling his retired pay. The difference in Admiral Lyon's retired pay if he was exempt under the Dual Compensation Act was substantial (over \$1,000 per month), and we believe that, based on the record before us, Admiral Lyon should have pursued this matter more thoroughly with ERDA and with the Navy in order to receive complete assurances that he was exempt from the dual compensation provisions. Therefore, we are unable to conclude that Admiral Lyon is without fault in this matter, and the denial of waiver is hereby sustained.

We note that the overpayment of retired pay was caused because the Navy did not receive Admiral Lyon's SF-50 and because the Navy failed to take notice of his Federal civilian employment when it received the employment forms he filed in 1976 and 1978. The Navy Family Allowance Activity has advised us that under its new procedures any indication of civil service employment of a retired regular officer will be cause for an investigation and a determination

B-198955

of the applicability of the Dual Compensation Act. We hope that this change in procedures will minimize the opportunities for such an administrative error in the future.

A handwritten signature in cursive script, reading "Milton J. Auer".

Acting Comptroller General
of the United States